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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 850

THE POMPEI WINERY, INC.,

Petitioner,

vs.

STATE OF OHIO BOARD OF LIQUOR CONTROL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of the State of Ohio.

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STATE OF OHIO BOARD OF LIQUOR CONTROL,

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PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of the State of Ohio.

Petitioner respectfully prays for a writ of certiorari to review a judgment of the Supreme Court of the State of Ohio.

OPINIONS BELOW.

The unreported opinion of the trial court is set forth as Appendix A at page 1a herein.

The unreported opinion of the Court of Appeals (Sixth District of Ohio) is set forth as Appendix B at page 7a herein.

The opinion of the Ohio Supreme Court is reported in 167 Ohio State 61 (November 27, 1957). A copy of the opinion is set forth as Appendix C at page 38a herein. (One judge dissented and wrote a dissenting opinion.)

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28 U. S. C. Section 1257 (3).

The decision of the Ohio Supreme Court, the highest court of the State of Ohio involves a title, right and privilege under the Constitution of the United States within the meaning of 28 U. S. C. 1257 (3), in that petitioner set up and claimed it was denied due process and equal protection of law in violation of Section I of the Fourteenth Amendment to the Constitution of the United States.

The judgment of the Ohio Supreme Court was rendered November 27, 1957. Application for rehearing, timely filed, was denied December 18, 1957.

QUESTION PRESENTED.

Broadly stated, the question presented is this:

Is a State in its control and regulation of the liquor industry subject to the sanctions and limitations of the United States Constitution ordinarily attendant to an exercise of its general police power by a state?

Stated specifically:

1. Are the statutes enacted by a State and the regulations promulgated thereunder for the control and regulation of the liquor industry within the State subject to the "Due Process" and the "Equal Protection" of the law requirements of the Fourteenth Amendment to the United States Constitution?
2. Is a state in its control and regulation of the liquor industry under its police power above and beyond the Constitution of the United States?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

CONSTITUTION OF THE UNITED STATES.

AMENDMENT XIV.

"1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The decision below also involved:

(a) Section 4301.13 Revised Code of Ohio and the preamble thereto, the full text of which is set forth in Appendix B, pages 10a-11a, and

(b) Regulation No. 3 of Article VII purportedly promulgated pursuant to said statute by the Board of Liquor Control the pertinent provisions of which regulation and the preamble or statement of purpose thereof are set forth in Appendix B, pages 11a-13a.

STATEMENT OF THE CASE.

During all the time here pertinent there was in force and effect in the State of Ohio the Ohio Liquor Control Act, Sections 4301.01-99 Revised Code of Ohio, which is a measure designed to regulate the traffic in beer and other intoxicating beverages; and to effectuate that purpose it excludes from engaging in that traffic all persons except those to whom licenses are issued by the Department of Liquor Control pursuant to and under the authority conferred by law, *State ex rel. vs. Davis*, 132 O. S. 308, 314.

During all the time herein pertinent, petitioner was a holder of a license duly issued to it by the Ohio Department of Liquor Control authorizing petitioner to manufacture, bottle and distribute wines at either wholesale or retail in the State of Ohio.

In 1949, the Ohio Legislature enacted Section 4301.13 Revised Code (formerly Section 6064.30 of the General Code) providing therein for the sale of bottled wine under "fair trade" regulations, and for that purpose authorized the Ohio Board of Liquor Control to determine and fix minimum mark-ups and minimum prices for bottled wine sold in Ohio, either at retail or wholesale.

In December 1949, and purportedly pursuant to said statute, said Board promulgated Article VII of Regulation No. 3 by which it determined and fixed minimum mark-ups and minimum prices for the sale of bottled wine in Ohio with the expressed purpose and intent to advance social control of wine, and to eliminate practices in the sale and distribution of wines in Ohio which cause intemperance and improper usages of wines. Petitioner claimed said regulation promulgated by the Board for such purposes was without statutory authority.

Further, in establishing minimum prices under subject regulation at which all bottled wines were to be sold in Ohio at retail or wholesale, said Board arbitrarily determined and applied a minimum overhead mark-up of 16% only on the bottling costs of wines bottled in Ohio. Said Board determined and applied no overhead mark-up on wines bottled outside of Ohio and imported into Ohio for sale at retail or wholesale.

Thus, in the State of Ohio, all persons duly licensed by the State to engage in the wine industry were not afforded equal protection under the law. Licensees who bottled and sold wine in the state were required to sell such wine at a minimum price established by the imposi-

tion of an arbitrary overhead mark-up of 16%. Licensees who sold bottled wine imported by them into the State were permitted to sell such wines at the same minimum price, but without imposition of any overhead mark-ups.

In 1955, petitioner was charged and found guilty of selling and distributing bottled wine in Ohio at a price less than the minimum wholesale price fixed by the Board of Liquor Control under subject regulation.

Petitioner defended claiming at every stage of the proceeding that:

(a) Subject regulation was without statutory authority, and

(b) That the 16% overhead mark-up imposed by the regulation only on wines bottled in Ohio, was arbitrary, unreasonable and discriminatory, and

(c) That by reason thereof petitioner was denied due process and equal protection of the law.

HOW FEDERAL QUESTION WAS PRESENTED.

At the hearing before the Ohio Board of Liquor Control, petitioner presented evidence tending to prove subject regulation arbitrary, unreasonable and discriminatory.

In the Common Pleas Court of Franklin County and in Court of Appeals of Ohio, 6th District and in the Ohio Supreme Court, the constitutional issues were considered and adjudicated adversely to petitioner.

On the constitutional issue, the Ohio Supreme Court found that a state in its control and regulation of the liquor industry is not subject to the sanctions and limitations of the United States Constitution ordinarily attendant to the exercise of its general police power by a state—and thereupon proceeded accordingly to sustain the validity of subject regulation, the minimum price established thereunder, and the conviction of petitioner.

REASONS FOR GRANTING THE WRIT.

This case is of vital public significance. Clarification of the law of the case should be forthrightly announced. It is timely and necessary that the United States Supreme Court invoke its supervisory jurisdiction on the important constitutional question here raised.

That any segment of American industry, whatever its capacity for social evil may be, operating under authority of law is without the protection afforded by the federal constitution is inconceivable. That is precisely what the Ohio Supreme Court held in its decision below, Appendix C, page 42a.

Inferentially, the court below considers "police power" of a state as being divisible. One part thereof the exercise of which is subject to sanctions and limitations of the Federal Constitution, and the other part thereof the exercise of which is not subject to constitutional sanctions and limitations.

There is, and can be only one "police power" exercisable by a state in its sovereign capacity. Police power, however exercised by a state, is subject to the constitutional limitations and guarantees of the Federal Constitution. This principle was clearly proclaimed in *Nebbia vs. New York*, 291 U. S. 502, 524.

There appears to be a mistaken but growing belief among legislators and administrative state officers that because an industry has a potential capacity for social evil, the State in its control and regulation of such an industry under its police power possesses unchallengeable and absolute authority, and that the State's exercise of police power in such an industry is above and beyond the Federal Constitution.

It may be proper for a state to prohibit entirely any traffic in alcoholic beverages because such industry is det-

rimental to society. But, where a state chooses to legalize the liquor industry and derives revenue from engaging therein and from granting licenses to engage in such business, may the state successfully contend, that because such industry has capacity for social evil, its control of such industry is not subject to the guarantees and limitations of the federal constitution?

It is incredible under our system of government to suppose the "law" is not obligated to accord constitutional protection to that which it creates by granting a license, whether such license be a so-called mere privilege or a substantial property right.

Conceding that if there be capacity for social evil, such fact may be relevant in determining the permissible scope of community control, but such fact does not authorize the state to exercise substantially uncontrolled power, *Joseph Burstyn, Inc. vs. Wilson*, 343 U. S. 495, 502. There can be no valid exercise of police power by a state that does not respect the guarantees and limitations of the federal constitution.

The immediate consequence of denying due process and equal protection of law to all persons lawfully licensed to engage in the wine industry within the framework of subject regulatory system provided by law in Ohio was devastating.

In 1949 there were 196 licensed bottlers of wine in the State of Ohio. At the time of the hearing before the Board there were 42 and the official report of the Department of Liquor Control in 1957 showed only 10 remained in business. In the course of eight years the wine bottling industry in the State was practically annihilated. But the consumption of wine within the State did not decrease. The volume of wine sold in Ohio increased. The volume of wine bottled in Ohio substantially decreased and the

volume of wine bottled outside of Ohio and imported into the State for sale increased.

In subject regulation, the Board provided a formula which it would employ in fixing the minimum price at which all wines would be sold in Ohio. This formula, in essence, called for a 16% overhead mark-up on the Ohio bottler's cost of bottling wine in Ohio. The price so determined was the minimum price at which all wines were to be sold in Ohio whether the particular wine was bottled in or out of the state.

After the regulation became effective—wines bottled in Ohio and wines imported into Ohio sold at the same minimum price established as aforesaid. By imposing aforesaid 16% overhead mark-up on the Ohio bottler, the sale price of wines bottled in Ohio was ultimately forced upward from a low of 59¢ a fifth to 86¢ a fifth to conform with the minimum price. On the other hand, no overhead mark-up was imposed on wines imported into Ohio. Consequently, the sale price of imported wines were in the main unaffected. Before the regulation, imported wines sold at 89¢ a fifth and under the regulation the sale price was 86¢ a fifth, at the time of the hearing before the Board.

Accordingly, the record disclosed that the out of state bottler operated at a competitive 8% overhead mark-up while the Ohio bottler was compelled by governmental regulation to operate on an arbitrary and artificial overhead mark-up of 16%, a differential of 100%.

It is plainly apparent that the Board geared its regulation for the determination of minimum price, not to accomplish social control of wine, but to create a controlled market for the benefit of importers of wine to the detriment of a local industry. This was neither a minimum price to promote "fair trade" as commanded by the statute, nor was it designed for social good as proclaimed by

the Board. It was a subtle device of vicious discrimination, and was a flagrant misuse of social power.

Needless to say, that the primary purpose of our government is to promote the health, morals, safety, prosperity and the general welfare of the people within its jurisdiction, and under both state and federal constitutions power is conferred upon government to pass all manner of laws and adopt all means reasonably calculated to accomplish those objects. But this power cannot be used as a cloak for arbitrary despotic and unreasonable action, even though the result to be accomplished may be regarded as praiseworthy. And the absurd position that the exercise of any police power by a state is above and beyond the provisions of our Federal Constitution is too ridiculous to admit of any argument, yet that was the only basis on which the Ohio Supreme Court could and did sustain the validity of the regulation.

It is here emphasized that petitioner does not question the right of any state, by proper exercise of its police power to regulate the liquor industry, or to determine and fix minimum mark-ups and minimum prices for the products of such business.

Also, it is not questioned that a state, by proper act of its legislature, may delegate such authority to an agency, such as the Ohio Board of Liquor Control.

But, petitioner does contend that "police power" exercised by the state or by any of its departments, agencies or officers is subject to the sanctions and limitations of the federal constitution.

If a state could declare the federal constitution subordinate to its police power whenever it felt a need therefor, constitutional government would cease to exist.

As broad and as indefinable as the police power of a state may be in its control and regulation of any industry,

it is incumbent upon this honorable court to hold and proclaim with unmistakable certainty that police power, however exercised by the state, is ever restricted by the Constitution of the United States, and that the Constitution is still the Supreme Law of the land.

WHEREFORE, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO.

(Rendered January 13, 1956.)

REYNOLDS, J.

This case is before the Court on appeal from a decision of the Board of Liquor Control suspending appellant's license for a period of fifteen days on each of two charges for violations of a regulation of the Board, and of Sec. 4301.10(A)(7) R. C.

The charges on which the suspensions were based are as follows:

"No. 1.

On August 3, 1954, and on numerous subsequent dates, you and/or your agent or employee did sell and distribute in Ohio to retail permit holders, bottled wine, at a price less than the 'minimum wholesale price' fixed by the Board of Liquor Control for the size of container, class, type or kind of wine—in violation of provisions of the Liquor Control Act and regulations of the Board of Liquor Control."

"No. 2.

On October 13, 1954, you and/or your agent or employee did prevent, hinder and obstruct investigators of the Department of Liquor Control from making an inspection of the business operation, while in the performance of their duty—in violation of provisions of the Liquor Control Act and regulations of the Board of Liquor Control."

A hearing was had on the above charges and the following orders were made by the Board:

"And said permit holder, appearing before the Board of Liquor Control to answer the charge set out in Violation No. 1 above, denied the same, and thereupon

the matter was submitted to the Board of Liquor Control on the evidence; and said Board, in consideration thereof, finds that the allegations of the Director of Liquor Control are well taken and supported by the evidence and that therefore the above permits should be suspended for a period of fifteen (15) days, beginning October 18, 1955, and ending at midnight, November 1, 1955.

"And said permit holder, appearing further before the Board of Liquor Control to answer the charge set out in Violation No. 2 herein, denied the same, and thereupon the matter was submitted to the Board of Liquor Control on the evidence; and said Board, in consideration thereof, finds that the allegations of the Director of Liquor Control are well taken and supported by the evidence, and that therefore the within permits should be suspended for an additional period of fifteen (15) days, said penalty, however, to be served concurrently with that assessed for Violation No. 1 herein, to-wit, beginning October 18, 1955, and ending at midnight, November 1, 1955."

Appellant at the times in question was the holder of Class A-2, B-4 and B-5 permits.

It is undisputed that appellant on and after August 3, 1954, sold on 41 occasions bottled wine at wholesale to retail permit holders at prices below the minimum wholesale prices as fixed by the Board.

It is the claim of appellant that the regulation adopted by the Board of Liquor Control fixing minimum prices of wine sold in Ohio is invalid.

The enabling statute under which the Board has acted with reference to fixing minimum prices is R. C. Sec. 4301.13, which provides as follows:

"The board of liquor control may adopt, promulgate, repeal, rescind, and amend rules and regulations to regulate the manner of dealing and distributing and selling bottled wine within the state. The board

may require out-of-state producers, shippers, bottlers, and holders of federal importers' permits shipping bottled wine into Ohio and holders of A-2, B-5, B-3, and B-2 permits issued by the department of liquor control, engaged in distributing and selling bottled wine in Ohio, to file with the department a schedule of prices in which minimum prices are set forth for the sale of bottled wine at wholesale or retail, or both, in Ohio. Any amendments, additions, alterations, or revisions to the schedule of prices as originally filed with the department shall be filed in the same manner as the original schedule of prices required to be filed with the department.

"The board may determine and fix the minimum mark-ups at wholesale or retail, or both, for bottled wine, and fix the minimum prices at which the various classes of bottled wine shall be distributed and sold in Ohio either at wholesale or retail, or both."

The validity of this statute has been upheld in the cases of *Beachman v. Board of Liquor Control*, 95 App. 177, the first syllabus of which is as follows:

"A statute which confers on an administrative board discretion to adopt subordinate rules, administrative in character, without establishing any standards for guidance, is not an unconstitutional delegation of legislative power where the discretion relates to a business carried on as a matter of privilege because of its character, such as dealing in intoxicating liquors rather than an ordinary lawful business carried on as a property right."

Pursuant to the above statute, the Board adopted the following regulation (3, Section 7):

"No holder of an A-2, B-5 or B-2 permit shall sell or distribute in Ohio for resale by retail permit holders, bottled wine at a price less than the 'minimum wholesale price' fixed by the Board for the size of container, class, type or kind of wine."

On May 25, 1954, the Board fixed the minimum prices for the quarter beginning July 1 and ending September 30, 1954, and it was for selling below these prices that the action heretofore stated was instituted. The validity of the enabling statute R. C. 4301.13 having been established, the question then presented is whether the prices fixed by the Board were arbitrary.

Article VII of Regulation 3 states the purpose of fixing prices and the methods therefore as follows:

> "This Article is promulgated pursuant to the provisions of Section 6064-3A of the General Code (R. C. Sec. 4301.13) to avoid economic and social consequences which flow from unfair competition and improper practices in the sale and distribution of alcoholic beverages. It is hereby declared to be the policy and intent of the Board, in promulgating this Article to advance the social control of an alcoholic beverage and to stabilize the sale and distribution of bottled wine in Ohio. It is intended to eliminate practices in the sale and distribution of wines in Ohio which cause intemperance and improper usage of bottled wines.
>
> "Section 1.
>
> In determining the 'minimum wholesale price' at which bottled wine, except champagne, sparkling wines and apertif wine, shall be sold or distributed in Ohio by the holders of A-2, B-5 and B-2 permits for resale to holders of C-2, D-2, D-3, D-3a, D-4 or D-5 permits, the Board will take into consideration and will be guided by the current selling prices for California wines in bulk in the principal markets of the United States, the charges for the necessary transportation and delivery of wine in bulk from the place of origin to Ohio, all taxes and assessments and levies on wine (both federal and state or states), and the general prevailing cost of labels, containers, crowns, caps

and seals. The cost so determined will be termed the 'prevailing cost' of such wine bottled in Ohio and there will be added to the cost above referred to, a bottling cost mark-up of 16% (sixteen percent) of such 'prevailing cost,' and which price so determined will be termed the 'minimum base cost.' The 16% mark-up is to cover in part, but without limitation, the cost for such items as labor, salaries of executives and officers, rent, depreciation and maintenance of equipment and property, selling costs, insurance, license fees, property taxes, delivery charges (if any), shrinkage, breakage, evaporation and general overhead expense. There will be added to the 'minimum base cost' of wine a wholesaler's mark-up of 20% (twenty percent) of the 'minimum base cost,' which price will be deemed the 'minimum wholesale price' to Class C-2, D-2, D-3, D-3a, D-4 or D-5 permit holders and which mark-up is to cover in part, but without limitation, the cost of doing business by a distributor at wholesale of bottled wine for such items as labor, salaries of executives and officers, rent, depreciation and maintenance of equipment and property, selling cost, insurance, license fees, property taxes, delivery charges (if any), breakage and general overhead cost.

"The Board will fix as the 'minimum wholesale price' to Class C-2, D-2, D-3, D-3a, D-4 and D-5 permit holders for wine produced outside the United States, but bottled outside of Ohio, will be fixed by the Board to be the same as the 'minimum wholesale price' fixed for wine produced or bottled in Ohio."

It is the contention of counsel for appellant that the method of determination of price is arbitrary in that it operates to the benefit of the out-of-state bottlers and to the detriment of the local bottlers and the purchasers, who are compelled to pay for local wines the same as wines brought in from out of the state, and are deprived of the benefit of the reduced costs and expenses incident to and connected with the operations by local bottlers.

In other words, the local bottler is prohibited from passing on to the consumer the benefit of this lower cost of production and it is argued that this tends to destroy the local bottlers' business, since, if the price is the same, a preference for the imported and nationally advertised wine will be indicated by the consumer.

While it may be unfortunate for a few, this does not necessarily mean that the minimum price must be fixed for their accommodation. Laws and regulations, after all, are presumably designed for the greatest good for the greatest number.

The liquor business has always been productive of and involved in many problems and from these problems have arisen laws and regulations designed to resolve or cope with those problems. One of the resulting problems inherent in connection with the business is, of course, that of intemperance and it was no doubt within the contemplation of the Legislature that the fixing of prices below which intoxicants could not be sold would have some tendency to reduce consumption and therefore result in a favorable effect on the problem of intemperance.

There can be little question but that under the provisions of the 21st Amendment to the Federal Constitution a state may by law either prohibit entirely the use of intoxicants within its borders, or establish conditions, rules and regulations, as to the traffic therein, including the imposition of conditions under which intoxicants may be brought into the state and how, in what manner and for what minimum prices it may be sold.

Under the laws of Ohio the privilege of engaging in the liquor business is accorded certain persons who are able to meet the statutory requirements, and in return for the privilege they must comply with all the laws and regulations enacted and adopted to govern and regulate the business.

One may not choose to disregard or violate a regulation by which he is bound, because he does believe that such regulation is wrong. It is binding until it is declared invalid by some court, or abolished or changed by proper authority.

The Court is of the same opinion as expressed in the *Blackmer* case, that the permit holder is bound by the minimum price regulations and that the decision of the Board of Liquor Control suspending appellant's license is affirmed.

With respect to the charge of hindering and obstructing investigations, the Court concludes that the evidence fails to show any intentional action on the part of appellant which comes within this charge and the order of the Board with respect to the second charge is reversed.

/s/ REYNOLDS,
Judge.

APPENDIX B.

OPINION OF THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO.

(Rendered December 5, 1956.)

DEENS, *J.*, of the Sixth District, sitting by designation.

This is an appeal on questions of law from a judgment of the Court of Common Pleas, affirming the order of the Board of Liquor Control suspending the Class A-2, B-4 and B-5 permits of appellant by reason of the sale of wine by appellant at prices in violation of the regulations of the Board, fixing minimum prices at which wine should be sold in the State pursuant to Section 4301.13, Revised Code.

The appellant has filed its assignments of error as follows:

"1. The judgment of the court is contrary to law.

2. The judgment of the court is contrary to the weight of the evidence.

3. The court erred in holding Section 4301.10 constitutional pursuant to which the appellant was charged and found guilty.

4. The court erred in holding Article VII, Sections 1, 2 and 3, etc., of the Regulations of the Board of Liquor Control constitutional and not arbitrary and unreasonable, upon which section the charges in this case were based.

5. The court erred in holding Section 4301.10 and Article VII, Sections 1, 2, 3, etc., constitutional.

6. The court erred in holding said Article VII, Sections 1, 2, 3, etc., constitutional and not in violation of the interstate commerce clause of the Constitution of the United States of America, being Article I, Section 8 thereof.

7. All other errors appearing in the record."

The appellant, The Pompei Winery, Inc., will be referred to hereinafter as the appellant and the appellee State of Ohio Board of Liquor Control as the Board.

The charges presented by the Board against the appellant were as follows:

"Violation No. 1. On August 3, 1954, and on numerous subsequent dates, you and/or your agent or employee, did sell and distribute in Ohio, to retail permit holders, bottled wine, at a price less than the 'minimum wholesale price' fixed by the Board of Liquor Control for the size of the container, class, type or kind of wine—in violation of the provisions of the Liquor Control Act and the regulations of the Board of Liquor Control.

Violation No. 2. On October 13, 1954, you and/or your agent or employee, did prevent, hinder and ob-

struct investigators of the Department of Liquor Control from making an inspection of the business operation, while in the performance of their duty—in violation of the provisions of the Liquor Control Act and the regulations of the Board of Liquor Control."

A stipulation was made between counsel for the parties at the hearing before the Board in which it was stipulated:

"It is hereby stipulated and agreed by and between counsel for the Permit Holder and counsel for the Director of the Department of Liquor Control The Pompei Winery, Incorporated, is the holder of a Class A-2, B-4 and B-5 permits, issued by the Department of Liquor Control; that The Pompei Winery, Incorporated, did sell and distribute in Ohio to retail permit holders, bottled wine in the quantities and at the price, and on the dates, and to the retail permit holders indicated on invoices marked as 'Department's Exhibit A' which exhibit consists of forty-one invoices."

It appears from the invoices referred to and marked as "Department's Exhibit A" that the appellant made 41 separate sales of wine at wholesale, to retailers at prices below the minimum price fixed by the Regulation of the Board.

The Board found the appellant guilty on the two charges as same appear above and suspended the permits of appellant for a period of 15 days on each charge, the same to be served concurrently.

The Court of Common Pleas in the appeal from the order of the Board, affirmed the finding and order of the Board as to charge Number One involving sales of wine by appellant at prices in violation of the minimum price as fixed by the Board and reversed the finding and order of the Board finding the appellant guilty on charge Number Two for the reason that the evidence was insufficient to support the finding on that charge.

Section 6064-3a, G. C., 123 Laws of Ohio, pp. 359, 360 (now Section 4301.13, Revised Code), as originally enacted, including preamble is as follows:

"(Amended Substitute Senate Bill No. 159)

AN ACT

To provide for the sale of bottled wine *under fair trade regulations* and for that purpose to authorize the board of liquor control to adopt such regulations, and to enact supplemental section 6064-3a.

Be it enacted by the General Assembly of the State of Ohio

Section I. That section 6064-3a of the General Code be enacted to read as follows:

RULES AND REGULATIONS FOR SALE OF BOTTLED WINE:

SCHEDULE OF PRICES FILED WITH DEPARTMENT, WHEN:

MINIMUM MARK-UP PRICES.

Section 6064-3a. The board of liquor control shall have the power to adopt, promulgate, repeal, rescind, and amend rules and regulations to regulate the manner and method of dealing in and distributing and selling bottled wine within the state. The board of liquor control may require out-of-state producers, shippers, bottlers, and holders of federal importers' permits shipping bottled wine into Ohio and holders of class A-2, B-5, B-3 and B-2 permits issued by the department of liquor control engaged in distributing and selling bottled wine in Ohio, to file with the department of liquor control a schedule of prices in which minimum prices are set forth for the sale of bottled wine at wholesale or retail, or both, in Ohio. Any amendments, additions, alterations, or revisions to the schedule of prices as originally filed with the department of liquor control shall be filed in the same manner as the original schedule of prices required to be filed with the department of liquor control.

The board of liquor control may determine and fix the minimum mark-ups at wholesale or retail, or both, for bottled wine, and fix the minimum prices at which the various classes of bottled wine shall be distributed and sold in Ohio either at wholesale or retail, or both."

Section 4301.13, Revised Code, involved in a consideration of this appeal, with changes made in the wording of the law as quoted above, is as follows:

"The board of liquor control may adopt, promulgate, repeal, rescind, and amend rules and regulations to regulate the manner of dealing in and distributing and selling bottled wine within the state. The board may require out-of-state producers, shippers, bottlers, and holders of federal importers' permits shipping bottled wine into Ohio and holders of A-2, B-5, B-3 and B-2 permits issued by the department of liquor control, engaged in distributing and selling bottled wine in Ohio, to file with the department a schedule of prices in which minimum prices are set forth for the sale of bottled wine at wholesale, or retail, or both, in Ohio. Any amendments, additions, alterations, or revisions to the schedule of prices as originally filed with the department shall be filed in the same manner as the original schedule of prices required to be filed with the department.

The board may determine and fix the minimum mark-ups at wholesale or retail, or both, for bottled wine, and fix the minimum prices at which the various classes of bottled wine shall be distributed and sold in Ohio either at wholesale or retail, or both."

Article VII of Regulation 3 states the purpose for the fixing of prices at which wine may be sold in the State.

"Article VII, MINIMUM PRICE.

This article is promulgated pursuant to the provisions of Section 6064-3A of the General Code (RC

#4301.13) to avoid economic and social consequences which flow from *unfair competition* and improper practices in the sale and distribution of alcoholic beverages. It is hereby *declared to be the policy and intent of the Board, in promulgating this Article to advance the social control of an alcoholic beverage* and to stabilize the sale and distribution of bottled wine in Ohio. It is intended to eliminate practices in the sale and distribution of wines in Ohio which cause intemperance and improper usage of bottled wines."

Section 1, Article VII of Regulation 3 provides as follows:

"Section 1. In determining the 'minimum wholesale price' at which bottled wine, except champagne, sparkling wines and apertif wine, shall be sold or distributed in Ohio by the holders of A-2, B-5 and B-2 permits for resale to holders of C-2, D-2, D-3, D-3a, D-4 or D-5 permits, the Board will take into consideration and will be guided by the current selling price of wine in bulk in California, the current selling prices for California wines in bulk in the principal markets of the United States, the charges for the necessary transportation and delivery of wine in bulk from the place of origin to Ohio, all taxes and assessments and levies on wine (both federal and state or states), and the general prevailing cost of labels, containers, crowns, caps and seals. The cost so determined will be termed the 'prevailing cost' of such wine bottled in Ohio and there will be added to the cost above referred to, a bottling cost mark-up of 16% (sixteen percent) of such 'prevailing cost' and which price so determined will be termed the 'minimum base cost.' The 16% mark-up is to cover in part, but without limitation, the cost for such items as labor, salaries of executives and officers, rent, depreciation and maintenance of equipment and property, selling costs, insurance, license fees, property taxes, delivery charges (if any), shrinkage, breakage, evaporation

and general overhead expenses. There will be added to the 'minimum base cost' of wine a wholesaler's mark-up of 2% (twenty percent) of the 'minimum base cost,' which price will be deemed the 'minimum wholesale price' to Class C-2, D-2, D-3, D-3a, D-4 or D-5 permit holders and which mark-up is to cover in part, but without limitation, the cost of doing business by a *distributor* at wholesale of bottled wine for such items as labor, salaries of executives and officers, rent, depreciation, and maintenance of equipment and property, selling cost, insurance, license fees, property taxes, delivery charge (if any), breakage and general overhead cost.

The Board will fix as the 'minimum wholesale price' to Class C-2, D-2, D-3, D-3a, D-4 and D-5 permit holders for wine produced outside the United States and imported into Ohio, the same 'minimum wholesale price' as is fixed for wine produced or bottled in Ohio.

The 'minimum wholesale price' to Class C-2, D-2, D-3, D-3a, D-4 and D-5 permit holders for wine produced in the United States, but bottled outside of Ohio, will be fixed by the Board to be the same as the 'minimum wholesale price' fixed for wine produced or bottled in Ohio."

Sections 2 and 3, Article VII, of Regulation 3, provide in detail and require all persons and firms engaged in the production, importation, sale and distribution of wine in the State of Ohio, to prepare and file schedules containing a description of product, prices and other data and information pertaining to the production, importation, sale and distribution of wine in the State.

The brief of counsel for appellant contains a statement of the issues involved in this appeal:

"This appeal involves the validity or constitutionality of Section 4301.10 A(7) R. C. and the minimum price regulations of the Board of Liquor Control, Article

> VII, Section 1, 2, 3, etc., by virtue whereof it is sought to establish minimum prices for the sale of bottled wine in Ohio.

We take note that the above statement of counsel for appellant does not make reference to Section 4301.13, R. C., but instead makes reference to Section 4301.10 A(7) R. C., which provides:

> "(7) Inspect, upon demand, the books, accounts, records, memorandums, and place of business of any person subject to Chapters 4301. and 4303. of the Revised Code or the laws relating to the manufacture, importation, transportation, distribution, and sale of beer and intoxicating liquor, and the sale of alcohol."

We have noted hereinabove that the Court of Common Pleas reversed the finding and order of the Board in reference to the charge that appellant hindered and prevented the investigator of the Board from making an inspection, consequently in our view sub-section A(7) of Section 4301.10 is not involved in this appeal, except as being a part of Chapters 4301 and 4303 of the Revised Code, which chapters contain the greater part of the laws of the State controlling and regulating the manufacture, importation, transportation, distribution and sale of beer and intoxicating liquor and the sale of alcohol in the State of Ohio. It is clear from a consideration of the assignments of error presented on behalf of the appellant that counsel did not intend to limit the issues as stated in the above quotation from brief of counsel.

The issues presented on this appeal as we consider them are that: Section 4301.13, Revised Code, is unconstitutional for the reason that it is beyond the police power of the State; fails to declare standards or a clear policy; is violative of the due process provisions of the State and Federal Constitutions, and also contravenes the commerce clause of the Federal Constitution.

Further, that Article VII of Regulation 3, Sections 1, 2, 3, etc., are arbitrary, unreasonable and contrary to the policy authorized by the Legislature and are therefore invalid and unconstitutional.

It is the contention of counsel representing the office of the Attorney General on behalf of the appellee Board, and also counsel as Amici Curiae, representing a considerable number of firms and various associations interested in the manufacture, sale and distribution of alcoholic beverages, that the issues involved in this appeal have been determined and are controlled by the decision of the Court of Appeals in this District in the case of *Blackman v. Board of Liquor Control*, 95 Ohio App., 177 (1952), 113 N. E. 2d 893, appeal dismissed as of right, 158 Ohio St., 348 (1952), 109 N. E. 2d, 281.

In our view, the headnotes in *Blackman v. Board of Liquor Control, supra*, state the issues and a determination of same with clarity, as follows:

> "1. A statute which confers on an administrative board discretion to adopt subordinate rules, administrative in character, without establishing any standards for guidance, is not an unconstitutional delegation of legislative power where the discretion relates to a business carried on as a matter of privilege because of its character, such as dealing in intoxicating liquors, rather than an ordinary lawful business carried on as a property right.
>
> 2. The provision of Section 6064-3a, General Code, empowering the Board of Liquor Control to 'determine and fix the minimum mark-ups at wholesale or retail, or both, for bottled wine, and fix the minimum prices at which the various classes of bottled wine shall be distributed and sold,' without fixing any standards or rules for the guidance of the board, is not an unconstitutional delegation of legis-

lative power, but states a legislative purpose to require the fixing of minimum mark-ups and minimum prices for the sale of wine.

3. Regulation 3, Article 7, of the Board of Liquor Control, establishing minimum prices for the sale of wine, is neither arbitrary nor unreasonable merely because the prices established fail to differentiate between the varying costs of wholesalers engaged in the same business and are fixed without the consideration of any factors incident to such costs."

Counsel for appellant, and also counsel representing a number of firms and associations, as Amici Curiae, in support of appellant, contend that the decision by the court in *Blackman v. Board of Liquor Control, supra*, did not determine and therefore does not control a determination of the issues presented on this appeal.

Counsel for appellant and counsel as *Amici Curiae*, in support of the contention that the decision in the *Blackman* case is not controlling and dispositive of the issues in this appeal, rely mainly upon statements in the opinion of the court in the *Blackman* case, that the court was in doubt as to whether the issues were properly before the court for determination and also that there was no evidence in the record bearing upon the claim that the Board, in fixing minimum prices failed to differentiate "between the varying costs of wholesalers engaged in the same business," etc., *Blackman* case, pp. 185, 186.

We take note and consider significant the statements referred to as they appear in the opinion in the *Blackman* case, that there was a lack of any evidence in that case bearing upon the claim that the Board failed to consider the varying costs to wholesalers engaged in the same business in determining the minimum prices and also the statement "Although we pass on all questions briefed, we doubt if they are properly before this Court," citing

"*Village of Clarington v. Althar*, 122 Ohio St., 608, 174 N. E., 251."

It should be noted in considering the statement in the opinion in the *Blackman* case as to whether the questions were properly before the court, that the writer of the opinion in the *Blackman* case had stated previously in the opinion, p. 178, that "No claim of invalidity of the rule was urged before the board." Likewise, no claim of invalidity was made in the case at bar in the hearing before the board. It is considered appropriate to state here, considering the clear unequivocal announcement appearing in the headnotes as quoted above, that although there was no evidence on the question as to the difference in costs to wholesalers and a doubt whether the questions were properly presented for decision, we have no difficulty in reaching the conclusion that the court in deciding the *Blackman* case intended to and did, as stated, p. 186, "pass on all questions briefed," which in our view did comprehend the issues involved in this appeal.

"Nevertheless, it is pertinent that the record now before us does contain testimony, also other evidence, and proffers relevant to the question of the so-called differential or variation in costs to wholesalers engaged in the same business and also that probably the record now before this Court is more complete in presenting the issues to be determined, and that therefore this Court should give further consideration in this opinion to the questions as same are presented by the record on this appeal."

It is contended further in part in this case, as stated by the Court of Common Pleas in affirming the finding and order of the Board:

> "It is the contention of counsel for appellant that the method of determination of price is arbitrary in that it operates to the benefit of the out-of-state bottlers and to the detriment of the local bottlers and the

purchasers, who are compelled to pay for local wines the same as wines brought in from out of the state, and are deprived of the benefit of the reduced costs and expenses incident to and connected with the operations by local bottlers.

In other words, the local bottler is prohibited from passing on to the consumer the benefit of this lower cost of production and it is argued that this tends to destroy the local bottlers' business, since, if the price is the same, a preference for the imported and nationally advertised wine will be indicated by the consumer."

It is contended on behalf of the Board, in substance, that in promulgating Section 1, Article VII, of Regulation 3, the Board has prescribed the method to be pursued in determining and fixing the minimum prices at which bottled wine wherever produced or bottled may be sold either at wholesale or retail or both in Ohio.

It is emphasized further that in determining and fixing the minimum prices at which wine may be sold at either wholesale or retail, or both, the Board has taken as a basis from which it has arrived at the minimum prices for wine, "the current market price for bulk wine produced in California," for the reason as acknowledged generally that the State of California produces 85% or more of all the wine consumed in the United States.

It is contended further with logical support in reason, and not disputed, that by reason of the dominant position of the State of California in the production of wine, it is the only market area for wine in which prices are determined by a distinterested agency, as is the Federal-State Market News Service at San Francisco, which agency issues weekly bulletins and publishes reliable information concerning the current market prices for California bulk wine, and that therefore the current market price of

California bulk wine is the natural basis from which to determine and fix minimum prices.

It is contended further, supported by an analysis of the method pursued by the Board in determining and fixing the minimum prices at which bottled wine may be sold in Ohio, that the prices are not determined in an arbitrary or unreasonable manner, but are arrived at by a detailed consideration of the actual costs and expenses incurred in the bottling, transportation, distribution and sale of bottled wine in Ohio.

It is also emphasized that Section 1 of Regulation 3 fixes the minimum prices, below which, no bottled wine wherever produced or bottled may be sold in Ohio.

It is contended by the appellant that the regulation and action of the Board are arbitrary and unreasonable for the reason that Ohio bottlers of wine can and would, if permitted, avoid many of the costs incurred by the California bottlers, including transportation costs, greater costs for bottling in shipping, national advertising of their product, distribution costs, and other elements and factors whereby the Ohio bottler can sell bottled wine at a lower price and realize a fair profit, which would inure to and be of substantial benefit to the consumers of wine in Ohio.

It is emphasized that nationally-advertised wine of the California producers and bottlers gain a preference by reason of the public preference for nationally-advertised brands of wine and that unless the Ohio bottler is permitted to sell the product at a lower price, the Ohio bottler will be and actually is being eliminated and forced out of the wine business.

It is also argued forcibly that the purpose of the regulations as declared by the Board and quoted above is beyond the legitimate authority of the Board and is contrary to the declared purpose and policy of the Legislature as

contained in the preamble to Section 4301.13, R. C. (Sec. 6064-3a, G. C.) 123 Ohio Laws, pp. 359-60, which it is contended was authority to "provide for the sale of bottled wine under fair trade regulations," etc., and was not intended to promote the betterment of social conditions and prevent intemperance, as declared by the Board.

It is conceded generally to be within the police power of the State to regulate and control the traffic in and sale of intoxicating beverages and that the Board may, if duly authorized, promulgate, adopt and enforce rules and regulations designed for the reasonable regulation and control of the sale and distribution of alcoholic beverages in the state.

We will consider first the contention that Section 4301.13 R. C. and the regulations of the Board, are violative of certain provisions of the Federal Constitution. The Twenty-first Amendment to the Federal Constitution repealing prohibition provides as follows:

> "Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
>
> Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

The highest court in the land has by clear announcements in numerous decisions determined that the States have, since the adoption of the Amendment, almost exclusive and unlimited authority in the control and regulation of the importation, distribution and sale of intoxicating beverages.

In *State Board of Equalization v. Young's Market Co., et al.*, 299 U. S., 59, 81 L. Ed., 38 (1936), it is stated in the opinion by Justice Brandeis, p. 63:

"The plaintiffs argue that, despite the Amendment, a state may not regulate importations except for the purpose of protecting the public health, safety or morals; and that the importer's license fee was not imposed to that end. Surely the State may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importations by laying a heavy impost, or channelize desired importations by confining them to a single consignee? * * * There is no basis for holding that it may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee? Moreover, in the light of history, we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic."

The Supreme Court announced in headnote in *Ziffrin v. Reeves*, 308 U. S., 132, 84 L. Ed., 128 (1939) that:

"The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without the state, unfettered by the commerce clause."

In the opinion in the *Ziffrin* case, *supra*, Justice McReynolds stated in part:

"The Twenty-first amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation,

sale or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect to them. * * * Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions? Former opinions here make an affirmative answer imperative. The greater power includes the less."

The Supreme Court again had the question of the authority of the State under consideration in *United States v. Brown Forman Distillers Corporation*, 324 U. S., 293, 89 L. Ed. 951 (1945) and it was stated in the opinion by Justice Frankfurter, p. 300:

"The Twenty-first Amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the States and national authority. Before that amendment—disregarding the interlude of the Eighteenth Amendment—alcohol was for constitutional purpose treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of the States to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-first Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a state to control, and to control effectively, the traffic in liquor within its borders. The course of legal history which made necessary the Twenty-first Amendment in order to permit the States to control the liquor traffic, according to their notions of policy freed from the restrictions upon state power which the Commerce Clause implies as to ordinary articles of commerce, was summarized in my concurring opinion in Carter vs. Virginia, 321 U. S., 131, 139, 88 L. Ed., 605, 612, 64 S. Ct., 464.

If a state for its own sufficient reason deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price-fixing in order to discourage the temptations of cheap liquor due to cut-throat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it. * * *"

The Supreme Court of the United States has in many decisions recognized and sanctioned the right and authority of the States to legislate in the fixing of prices affecting commodities and products in trade and commerce notwithstanding the products and trade may be related to commerce between the States, holding in numerous cases that such legislation was not violative of the due process clause of the Federal Constitution.

A comprehensive pronouncement is found in the headnotes in *Nebbia v. New York*, 291 U. S., 502, 78 L. Ed., 940:

"4. Neither property rights nor contract rights are absolute, and equally fundamental with either is the right of the public to regulate such rights in the common interest, subject to constitutional restraints.

5. The Fifth and Fourteenth Amendments do not prohibit governmental regulation for the public welfare, but merely require that the end shall be accomplished by methods consistent with due process.

8. Where an industry is subject to regulation in the public interest, the due process clause does not prevent the state from correcting maladjustments by fixing the prices of products and commodities of the industry.

11. The phrase 'affected with a public interest,' as used in decisions upholding public regulation of businesses affected with a public interest, means only that an industry, for adequate reason, is subject to control for the public good.

12. So far as the due process requirement is concerned, a state is free to adopt and enforce whatever economic policy may reasonably be deemed to promote public welfare, whether by promoting free competition by laws aimed at monopolies, or by curbing harmful competition by fixing minimum prices.

13. Where a law is not arbitrary or discriminatory, the courts cannot deal with the wisdom of the legislative policy or with the adequacy or practicability of the law enacted to forward it.

14. The Constitution does not secure the liberty to conduct a business so as to injure the public at large or any substantial group."

Again, in *Olsen v. Nebraska*, 313 U. S., 236, 85 L. Ed., 1305, it is stated in part by Justice Douglas:

"* * * Save for that decision and Morehead v. New York, 298 U. S., 587, 80 L. Ed., 1347, 56 S. Ct. 918, 103 ALR 1445, holding unconstitutional a New York statute authorizing the fixing of women's wages, the subsequent cases in this Court have given increasingly wider scope to the price-fixing powers of the states and of Congress. Tagg Bros. & Moorhead v. United States, 280 U. S. 420, 74 L. Ed. 524, 50 S. Ct., 200, decided in 1930, upheld the power of the Secretary of Agriculture under the Packers and Stockyards Act to determine the just and reasonable charges of persons engaged in the business of buying and selling in interstate commerce livestock at a stockyard on a commission basis. In 1931 a New Jersey statute limiting commissions of agents of fire insurance companies was sustained by O'Gorman & Young v. Hartford F. Ins. Co., 282 U. S., 251, 75 L. Ed., 324, 51 S. Ct., 130, 72 ALR 1163. A New York statute authorizing the fixing of minimum and maximum retail prices for milk was upheld in 1934. Nebbia v. New York, 291 U. S. 502, 78 L. Ed. 940, 54 S. Ct. 505, 89 ALR 1469. And see Hegeman Farms Corp. v. Baldwin, 293 U. S. 163, 79 L. Ed. 259, 55 S. Ct. 8; Borden's Farm

Products Co. v. Ten Eyck, 297 U. S. 251, 80 L. Ed. 669, 56 S. Ct. 453. Cf. Baldwin v. G. A. F. Seelig, Inc., 294 U. S. 511, 79 L. Ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55; Mayflower Farms v. Ten Eyck, 297 U. S. 266, 80 L. Ed. 675, 56 S. Ct. 457. In 1937 Adkins v. Children's Hospital, 261 U. S. 525, 67 L. Ed. 785, 43 S. Ct. 394, 24 A. L. R. 1238, was overruled and a statute of Washington which authorized the fixing of minimum wages for women and minors was sustained. West Coast Hotel Co. v. Parrish, 300 U. S. 379, 81 L. Ed. 703, 57 S. Ct. 578, 108 A. L. R. 1330. In the same year Townsend v. Yeomans, 301 U. S. 441, 81 L. Ed. 1210, 57 S. Ct. 842, upheld a Georgia statute fixing maximum warehouse charges for the handling and selling of leaf tobacco. Cf. Mulford v. Smith, 307 U. S. 38, L. Ed. 1092, 59 S. Ct. 648; Currin v. Wallace, 306 U. S. 1, 83 L. Ed. 441, 59 S. Ct. 379. The power of Congress under the commerce clause to authorize the fixing of minimum prices for milk was upheld in United States v. Rock Royal Cooperative, 307 U. S. 533, 83 L. Ed. 1446, 59 S. Ct., 993, decided in 1939. The next year the price-fixing provisions of the Bituminous Coal Act of 1937 were sustained. Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, 84 L. Ed. 1263, 60 S. Ct., 907. And at this term we upheld the minimum wage and maximum hour provisions of the Fair Labor Standards Act of 1938. United States v. Darby, 312 U. S. 100, ante, 609, 61 S. Ct. 451, 132 A. L. R. 1430."

In *Federal Power Commission v. Natural Gas Pipeline Company of America*, 315 U. S. 575, 86 L. Ed. 1037 (1942) it was determined that there was no violation of the 5th Amendment in the regulation of the price of gas and that the power of a State and Congress to regulate prices extends to wholesale as well as retail sales.

It is our conclusion after consideration of many cases decided by the Supreme Court of the nation applicable

to the question, that Section 4301.13, Revised Code, does not violate either the due process provision or the commerce clause of the Federal Constitution.

It has been determined and announced clearly by the Supreme Court of this State that the Legislature, in the exercise of the police power, may pass laws designed to regulate and control the traffic and sale of intoxicating beverages and that it may delegate authority to the Board of Liquor Control in order to accomplish that purpose. *State, ex rel. Wellerstroem v. Department of Liquor Control of State of Ohio, et al.*, 129 Ohio St., 185, 194 N. E. 372; *State, ex rel. Zugravu v. O'Brien*, 130 Ohio St., 23; 196 N. E. 664; *Frankenstein v. Leonard*, 134 Ohio St., 251, 16 N. E. 2nd, 424; *Superior Distributing Co. v. Davis*, 132 Ohio St., 308 (1937), 7 N. E. 2nd 652.

In *State, ex rel. Zugravu v. O'Brien, supra*, the headnotes are:

> "1. Within constitutional limitations, the General Assembly may, in the exercise of the police power, limit or restrict, by regulatory measures, the traffic in intoxicating liquors.
>
> 2. Permits to carry on the liquor business which are issued under the provisions of the Liquor Control Act are mere licenses, revocable as therein provided, and create no contract or property right.
>
> 3. Where authority to revoke such a permit is conferred upon an executive or administrative officer by legislative enactment with right of appeal to an administrative board, and with provision therein for giving notice to permittee, and for adequate hearing and the summoning of witnesses both before such officer and reviewing board, but without provision for recourse to the courts by appeal or error, such legislation does not amount to a denial of due process of law under the state or federal Constitution."

In the opinion, it is stated in the *O'Brien* case, *supra*, as to the police power of the state in the control of intoxicating liquor:

"As an attribute of sovereignty without any constitutional provision conferring it; in fact, it is essential to the existence of government and is asserted to protect the wellbeing of society and maintain the security of the social order. It is invoked by the courts to sustain legislative enactments which are passed to provide for the public health, morals, safety or welfare and which do not contravene any constitutional provision. The objective of the exercise of the police power is the promotion of the public good.

Prior to the constitutional prohibition of the liquor traffic the Legislature of this state had power to limit and restrict by regulation the manufacture and sale of intoxicating liquor, in the exercise of the police power. Bloomfield v. State, 86 Ohio St., 253, 93 N. E., 309, 41 L. R. A. N. S., 726, Ann. Cas. 1913 D., 629.

Since the repeal of constitutional prohibition in the state and nation the same legislative power exists and by its exercise the Liquor Control Act was passed. Under its statutory provisions, natural and artificial persons may engage in the liquor traffic only to the extent to which they are permitted to do so.

* * * * *

The permits of relator were by the terms of the statute issued expressly subject to termination in the way provided. She had therefore mere revocable licenses and no more. Such a permit is not a property right in the constitutional sense and, if it may be considered in the nature of property at all, it is limited in its scope by the same legislative act which gives it existence, and the reservation of the power of termination enters into and becomes a part of the grant of permission to carry on the specific business. It follows that if the permit is terminated in a lawful manner under the provisions of the act creating it, the

licensee cannot complain as his license to operate was issued to him subject to that contingency. The holdings are uniformly to the effect that such a license does not create a property right within the constitutional meaning of that term, nor even a contract, and that it constitutes a mere permission to engage in the liquor business, which may be revoked in the prescribed legislative manner."

(Many decisions in support of the statement quoted are cited by the court in the opinion.)

In *State, ex rel. Superior Dist. Co. v. Davies, et al., supra*, pertinent headnotes considered applicable here are:

"1. The Ohio Liquor Control Act is a measure designed to regulate and control the traffic in beer and other intoxicating beverages and, to effectuate that purpose, it excludes from engaging in such traffic all persons except those to whom licenses are issued by the Department of Liquor Control pursuant to and under the authority conferred by the law.

2. The state may either entirely prohibit importations of intoxicating liquors, or it may discourage or limit such importations by laying a heavy impost.

3. By reason of the provisions of the Twenty-first Amendment of the Constitution of the United States prohibiting the importation of intoxicating liquors into a state in violation of its laws, the exaction of a license fee by a state for the privilege of importing beer cannot be held violative of the commerce clause of the Constitution of the United States.

4. Statutory provisions and regulations authorized thereby which prohibit or limit the importation of intoxicating liquors, or levy a license fee or tax thereon in excess of that imposed upon liquors manufactured in Ohio, are not violative of the equal protection clause of the federal Constitution, or of Section 2 of Article 1 of the state Constitution. A

classification recognized by the Twenty-first Amendment cannot be deemed forbidden by the Fourteenth Amendment.

5. Section 6064.67, General Code, authorizing the levy and collection of additional taxes, fees and charges on the products of manufacturers of wines or manufacturers or brewers of beer and other malt liquors manufactured in another state and shipped into this state, in the same proportion or in the same amount as taxes, fees and charges levied and collected in such other state upon or against the products of Ohio manufacturers of wines or manufacturers or brewers are in excess of those levied and collected on the products or manufacturers and brewers of such other state, constitutes a valid exercise of the police power of the State of Ohio under the Twenty-first Amendment of the Constitution of the United States.

6. The provisions of Section 6064.67, General Code, and regulations of the Tax Commission of Ohio adopted pursuant to authority therein conferred, do not constitute a delegation of legislative power and are not violative of Section 1 of Article II, or Section 5 of Article XII of the State Constitution.

7. Section 6064-67, General Code, is in pari materia with other provisions of the Ohio Liquor Control Act and, when so construed, is not violative of Section 5 of Article XII of the State Constitution, requiring laws imposing a tax to state the object of the same."

It is stated in the opinion "By the Court" in part in *Frankenstein v. Leonard, et al., supra:*

"By the Court: The plaintiff's numerous complaints may be outlined by stating that he claims these statutes are in conflict with Sections 1 and 19 of Article I, Sections 1 and 26 of Article II, Section 1 of Article IV, Section 1 of Article XIII and Section 1 of Article XIX of the Constitution of Ohio; also, Sections 8, 9 and 10 of Article I, Section 4 of Article IV,

and Clause 2 of Article VI of the Constitution of the United States; and also Articles V, XIV and XXI of the Amendments to the Constitution of the United States.

Extended discussion is unnecessary inasmuch as most of the contentions of the plaintiff require merely a recital and reapplication of the fundamental and decisive pronouncements already made by this court in the following four cases involving certain provisions of these statutes. In the plaintiff's briefs none of the four is discussed and only one is mentioned.

Contrary to the present contentions of the plaintiff, this court in the first paragraph of the syllabus in the case of State, ex rel. Wetterstroem v. Department of Liquor Control, 129 Ohio St., 185, 194 N. E., 372, held that 'The Liquor Control Act, Section 6064-1, et seq., General Code, is a special, all-inclusive act controlling traffic in intoxicating liquors * * *.' Later in the case of State ex rel. Zugravu v. O'Brien, 130 Ohio St., 23, 196 N. E., 664, the following three paragraphs appear in the syllabus."

Following the statement above the court cited with approval and quoted the headnotes in the earlier decision of the court in *State, ex rel. Superior Distributing Co. v. Davis, supra*, and also *Coady v. Leonard*, 132 Ohio St., 329, 7 N. E. 2d, 649.

We are in accord with the view and statement of the writer of the opinion in the *Blackman* case, *supra*, in reference to the contention that the legislative purpose has not been stated in Section 4301.13:

"The legislative purpose to require the fixing of minimum prices at which wine shall be sold in Ohio is implicit in the language of the section. It is evident that those who handle wine for sale in the course of business do so for the purpose of making a profit. To make a profit there must be a mark-up whether the wine is sold at wholesale or retail. When, then, the

Legislature provided that the Board of Liquor Control may determine and fix minimum mark-ups and minimum prices, it was tantamount to declaring the legislative purpose that there should be mark-ups and that there should be minimum prices for the sale of wine."

Page 179, opinion *Blackman* case, *supra*.

We are also in full accord with the statement in the opinion of the court in the *Blackman* case, *supra*, on the question of the failure of the Legislature to set out and declare standards and rules for the guidance of the Board in fixing mark-ups and minimum prices. See pp. 179, 180, 181. See also *Matz, Admr. v. J. L. Cartage Co.*, 132 Ohio St., 271, 7 N. E. 2nd, 200. Judge Hornbeck, quoting in his opinion in the *Blackman* case, *supra*, a pertinent statement found in the opinion in the *Matz* case, *supra*:

"* * * it is apparent that according to the great weight of authority the Legislature may confer upon administrative boards power to adopt subordinate rules, administrative in character, where the Legislature in conferring the authority has fixed definite standards and rules of guidance. But the rule relaxes somewhat as to the necessity for such limitations and restrictions, where wide power is imperative in law enforcement; and many authorities have held that standards or criteria for guidance are not necessary in cases in which the discretion to be exercised by administrative officers relates to police regulations in the protection of the public morals, health, safety or general welfare."

See also *Weber, appellant, v. Board of Health, etc.*, 148 Ohio St., 389, the second paragraph of the syllabus being as follows:

"Where a law relates to a police regulation for the protection of public health, and it is impossible or impractical to provide specific standards, and to do so

would defeat the legislative object sought to be accomplished, such law is valid and constitutional without providing such standards.

(Paragraph seven of the syllabus in Matz, Admr. v. J. L. Curtis Cartage Co., 132 Ohio St., 271, approved and followed)."

The decision of the Supreme Court in the case of *The L. & M. Investment Co. v. Cutler, et al.*, 125 Ohio St., 12, 180 N. E. 379 (cited in the *Blackman* case), is considered applicable here, in which case it is stated in the opinion, pp. 18 and 19:

"It is an elementary principle of our jurisprudence that in determining whether a law or ordinance is constitutional, every reasonable presumption will be indulged in favor of its constitutional validity, and that it is only when there is a clear incompatibilty between the legislative act and the Constitution that the judicial power will refuse to execute it. This principle applies whether the legislative act be a statute or a municipal ordinance. Cincinnati, W. & Z. Rd. v. Commissioners of Clinton County, 1 Ohio St., 77; City of Xenia v. Schmidt, 101 Ohio St., 437, 130 N. E. 24. Eighty years ago in Cincinnati, W. & Z. Rd. Co. v. Commissioners, supra, discussing the question of delegation of power and the conferring of authority for the execution of a law upon an administrative agency, Judge Ranney said (at page 88 of 1 Ohio State): 'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.' And in Yee Bow v. City of Cleveland, 99 Ohio St., 269, 124 N. E. 132, 12 A. L. R. 1424, this court unanimously held that an ordinance imposing upon an administrative officer (as a pre-

requisite to the issuance of a license) the duty of ascertaining facts relating to public health did not confer legislative power upon such officer in a conditional sense, although resort might be had to the courts if his conduct should prove to be arbitrarily exercised or palpably unwarranted. In discussing the constitutionality of the creation of boards of appeal and their power to vary the provisions of a zoning ordinance, an author dealing with the subject of zoning states that courts have held 'that not only was it constitutional to create such boards, but the delegation to them, of the right to so vary certain provisions under certain circumstances, was not an unlawful nor an unreasonable delegation of power.' Metzenbaum on Zoning, page 260."

One of the principal contentions of counsel on behalf of a number of firms and associations representing wine interests as Amicus Curiae and in support of the appellant is stated in the brief as follows:

"Said regulations * * * in fixing minimum prices to advance social control of wine and to eliminate practices in the sale and distribution of wine which cause intemperance and improper usage thereof * * * is not * * * a fair trade regulation as required by the statute, and its adoption was without statutory authority, and therefore said regulation is invalid."

We are not impressed that the argument is sound in support of the claimed conflict in purpose or policy, and consider it to be a much too narrow view when the extent of the broad police power of the state in the regulation and control of intoxicating liquor is given consideration. It is our view that there is no conflict in the purpose as declared by the Legislature and as declared by the Board in promulgating the regulations, but that they are consistent and alike, in that both are aimed at the control and regulation of wine, pursuant to the police power, for the pro-

tection of the morals, safety and general welfare of the people of the State. It is to be implied that the purpose of fair "trade" regulations and the fixing of minimum prices at which bottled wine may be sold in the State are for the betterment of social conditions and for the protection of the morals, health, safety and welfare of the people.

In 10 *Ohio Juris.* 2nd, Section 126, a pertinent statement is made concerning the questions of "Policy, Wisdom, Expediency or Justice" of legislation enacted by virtue of the police power of the State:

> "The court approaches the question of constitutionality of legislation without regard to the personal opinions of the judges as to what the law ought to be or what they think of its purpose and effect. The principle that the judiciary has nothing to do with the propriety, wisdom, policy, or expediency of legislation, is a significant limitation upon the powers of the court in the interpretation of constitutions and the determination of whether or not legislative enactments conform to or violate the provisions of the state and Federal Constitutions. The court is not concerned with the propriety or policy of legislation but only with the power of the legislative power to enact it.
>
> The rule, as commonly expressed, is that the judiciary cannot hold laws invalid merely because they are inexpedient, unwise, unjust, generally unreasonable, or arbitrary, immoral, mischievous, or inconvenient in application and enforcement.
>
> Once the power to legislate on a subject is found to exist in the General Assembly, the wisdom of its exercise is not a judicial question. As is well understood, the remedy for unwise or unjust legislation cannot be administered by the courts. The judiciary may intervene only when it is convinced that the legislative act is incompatible with the provisions of the Constitution."

The foregoing is supported fully by many decisions of the Supreme and Appellate Courts in this State, and the supporting cases are cited by the writers in the footnotes.

It is generally believed that there is no other enterprise or business or commercial activity which is affected with so great a public interest as is that of the manufacture, distribution and sale of intoxicating liquors.

It is therefore considered that particular consideration should be given to the general nature and comprehensive scope of the police power in a determination of the issues presented in the case now before the court.

We therefore quote further from 10 *Ohio Juris.* 2nd, in reference to the nature and comprehensive extent of the police power of the State:

> "The police power has been described as the most essential, at times the most insistent, and always one of the least limitable of the powers of government. It is the source of the power residing in legislative bodies to enact legislation intended to protect the public safety, the public health, and the public morals.
>
> The police power is an essential, vital and inherent attribute of sovereignty. * * *
>
> Police power has been said to be synonymous with sovereign power; and to be but another name for the power of government. In effect, the police power is said to sum up the whole power of government, all other powers being only incidental and ancillary to the execution of the police power. It is that full, final power that is involved in the administration of law as a means to the administration of practical justice. In its broadest sense it includes all legislation and almost every function of civil government. * * *
>
> The police power is that large and comprehensive power essential to the preservation of public welfare and safety. In a general sense, the police power is the

power to guard public morals, safety, and health, and to promote the public convenience and the common good; the inherent power in the State which permits it to prevent all things harmful to the comfort, welfare, and safety of society, or to enact laws necessary to protect the order, safety, health, morals, and general welfare of the people of the state. It is the power of government to enact all manner of laws in furtherance of the public safety, health, morals, general welfare, and prosperity of the body politic. It is that inherent sovereignty which it is the right and duty of the government or its agents to exercise whenever public policy in a broad sense demands, for the benefit of society at large, regulations to guard its morals, safety, health, order, or to insure in any respect such economic conditions as an advancing civilization of a highly complex character requires.

The police power may be defined as 'authority to establish for the intercourse of the social members of the body politic, with each other, those rules of good conduct and good neighborhood, which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a corresponding enjoyment by others,' as the power 'by which persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state,' or as 'that power, conceded to reside in the people's representatives, which is rightfully exercised by the regulation of the use of private property, or so restraining personal action, as to secure, or tend to the comfort, health, or protection of the community.

The phrase 'police power' has become a convenient expression to indicate that reserved power of government in the states, notwithstanding the due process clause of the Fourteenth Amendment. While this reserved power is usually exercised in matters

pertaining to safety, health, and morals, it includes the power to legislate to accomplish any just object of government by appropriate legislation not specifically prohibited."

Secs. Nos. 399, 330, 331, 334, 10 *Ohio Juris.*, 2nd, pp. 406, *et seq.*

The foregoing quoted statement is also fully supported by many decisions of both the Supreme and Appellate Courts in the State, and the cases are cited in footnotes.

We consider it unnecessary to determine whether the evidence received and proffered in the hearing before the Board was, with respect to each item thereof, competent or whether such evidence tended to establish a so-called differential or difference in the cost to wholesalers engaged in the same business, for the reason that in our view such difference would not, if proven, support the charge that the regulations were arbitrary and unreasonable and therefore are invalid.

Also in reference to the claim of a "differential" in costs, we do not believe that the decision of the Supreme Court in *Serrer, d.b.a. H. H. Serrer & Son, appellant, v. Price, et al., appellees*, 148 Ohio St., 389, cited and relied upon has definite bearing in a decision on this appeal for the reason that the "Unfair Cigarette Sales Act" was applicable and controlling in a determination of the issues in that case, as we view it, and for the further reason that we do not consider the facts and circumstances analogous, but that they are distinguishable.

Appellant's assignments of error are overruled and we determine that Section 4301.13, Revised Code, is not violative of either the State or Federal Constitutions and that Article VII of Regulation No. 3 and the sections there-

in are not arbitrary or unreasonable and we therefore shall affirm the judgment of the Court of Common Pleas.

Judgment affirmed and cause remanded.

FESS, *J.*, of the Sixth District, and HUNSICKER, *P. J.*, of the Ninth District, concur.

APPENDIX C.

OPINION OF THE SUPREME COURT OF OHIO.

The class A-2, B-4 and B-5 permits of appellant herein were suspended by order of the Board of Liquor Control, appellee herein, pursuant to a hearing by said board and a finding that appellant was guilty of specified violations of a certain regulation adopted by the board and fixing minimum prices at which bottled wine might be sold in the state of Ohio.

The regulation of the board which the appellant was found to have violated is Section 1, Article VII of Regulation 3, which article is in part as follows:

"This article is promulgated pursuant to the provisions of Section 6064-3*a* of the General Code [Section 4301.13, Revised Code], to avoid economic and social consequences which flow from unfair competition and improper practices in the sale and distribution of alcoholic beverages. It is hereby declared to be the policy and intent of the board, in promulgating this article to advance the social control of an alcoholic beverage and to stabilize the sale and distribution of bottled wine in Ohio. It is intended to eliminate practices in the sale and distribution of wines in Ohio which cause intemperance and improper usage of bottled wines.

"Section 1. In determining the 'minimum wholesale price' at which bottled wine, except champagne, sparkling wines and apertif wine, shall be sold or distributed in Ohio by the holders of A-2, B-5 and B-2 permits for resale to holders of C-2, D-2, D-3, D-3a, D-4 or D-5 permits, the board will take into consideration and will be guided by the current selling price of wine in bulk in California, the current selling prices for California wines in bulk in the principal markets of the United States, the charges for the necessary transportation and delivery of wine in bulk from the place of origin to Ohio, all taxes and assessments and levies on wine (both federal and state or states), and the general prevailing cost of labels, containers, crowns, caps and seals. The cost so determined will be termed the 'prevailing cost' of such wine bottled in Ohio and there will be added to the cost above referred to, a bottling cost markup of 16% (sixteen per cent) of such 'prevailing cost' and which price so determined will be termed the 'minimum base cost.' The 16% markup is to cover in part, but without limitation, the cost for such items as labor, salaries of executives and officers, rent, depreciation and maintenance of equipment and property, selling costs, insurance, license fees, property taxes, delivery charges (if any), shrinkage, breakage, evaporation and general overhead expenses. There will be added to the 'minimum base cost' of wine a wholesaler's markup of 20% (twenty per cent) of the minimum base cost; which price will be deemed the 'minimum wholesale price' to class C-2, D-2, D-3, D-3a, D-4 or D-5 permit holders and which markup is to cover in part, but without limitation, the cost of doing business by a distributor at wholesale of bottled wine for such items as labor, salaries of executives and officers, rent, depreciation, and maintenance of equipment and property, selling cost, insurance, license fees, property taxes, delivery charge (if any), breakage and general overhead cost.

"The board will fix as the 'minimum wholesale price' to class C-2, D-2, D-3, D-3a, D-4 and D-5 permit holders for wine produced outside the United States and imported into Ohio, the same 'minimum wholesale price' as is fixed for wine produced or bottled in Ohio.

"The 'minimum wholesale price' to class C-2, D-2, D-3, D-3a, D-4 and D-5 permit holders for wine produced in the United States, but bottled outside of Ohio, will be fixed by the board to be the same as the 'minimum wholesale price' fixed for wine produced or bottled in Ohio."

Appellant contends that this regulation is defective, but the board asserts that such regulation represents a valid exercise of the power given it by the General Assembly through the enactment of that part of Section 6064-3*a*, General Code, which, as present Section 4301.13, Revised Code, is, in part, as follows:

"The board [of liquor control] may determine and fix the minimum markups at wholesale or retail, or both, for bottled wine, and fix the minimum prices at which the various classes of bottled wine shall be distributed and sold in Ohio either at wholesale or retail, or both."

The Court of Common Pleas of Franklin County affirmed the finding of the board as to this aspect of the charges made against appellant, reversed the finding of the board on a point not in issue herein, and rendered a judgment to that effect.

The judgment of the Court of Common Pleas was affirmed by the Court of Appeals for Franklin County.

The cause is before this court as an appeal as of right and pursuant to the allowance of a motion to certify the record.

Mr. Frank V. Opaskar, for appellant.

Mr. William Saxbe, attorney general, and *Mr. S. Noel Melvin*, for appellee.

Per Curiam. Appellant advances numerous arguments attacking the validity of the above statute and regulation, but, in essence and as confined to the facts of the instant case, its contentions are that Section 4301.13, Revised Code, is unconstitutional; that Section 1, Article VII of Regulation 3 of the Board of Liquor Control, is unconstitutional in that it is arbitrary, discriminatory and in derogation of the power delegated by the General Assembly through Section 4301.13; and that Section 1, Article VII of Regulation 3, is in contravention of Section 8, Article I of the Constitution of the United States—the "interstate commerce clause."

It is apparent at the outset that most of appellant's contentions may be answered in the language, unanimously adopted by this court in the *per curiam* opinion in the case of *Frankenstein v. Leonard et al., Board of Liquor Control*, 134 Ohio St., 251, 16 N. E. (2d), 424, that "extended discussion is unnecessary inasmuch as most of the contentions * * * require merely a recital and reapplication of fundamental and decisive pronouncements already made by this court."

The most cursory examination of that and the following cases indicates clearly the practically unlimited extent of legislative power to control the manufacture, distribution and sale of alcoholic beverages which is recognized by the law, and the great extent to which this power has been allowed to be exercised and delegated without judicial interference: *State Board of Equalization of California v. Young's Market Co.*, 299 U. S., 59, 81 L. Ed., 38, 57 S. Ct., 77; *Ziffrin, Inc., v. Reeves, Commr.*, 308 U. S., 132, 84 L. Ed., 128, 60 S. Ct., 163; *United States v. Frankfurt Distilleries, Inc.*, 324 U. S., 293, 89 L. Ed., 951, 65 S. Ct., 661; *State, ex rel. Wetterstroem, v. Department of Liquor Control*, 129 Ohio St., 185, 194 N. E., 372; *State, ex rel. Zugravu,*

v. O'Brien, 130 Ohio St., 23, 196 N. E., 664; *Frankenstein v. Leonard*, *supra*; and *State, ex rel. Superior Distributing Co., v. Davis et al., Tax Commission*, 132 Ohio St., 308, 7 N. E. (2d), 652.

From the law expounded in those cases, it is seen that the liquor industry of any state in the union exists, if at all, only at the will and pleasure of the people of that particular state, either by popular vote or through their legislative body, and then only according to the laws prescribed by such people or legislative body and the rules and regulations of any administrative body to which authority has been lawfully delegated. And it is of prime importance to recognize the fact that control of its liquor industry by a state is not subject to the constitutional sanctions and limitations ordinarily attendant to an exercise of its general police power by a state.

The liquor industry of the entire nation was divested of any of such constitutional guaranties when it was divested of legal existence by the Eighteenth Amendment to the Constitution of the United States, and the Twenty-first Amendment cannot be said to have returned to the liquor industry any of the protection and guaranties which may have existed prior to the passage of the Eighteenth Amendment.

See *United States v. Frankfort Distilleries, Inc.*, *supra* (324 U. S., 293), wherein Justice Frankfurter, in a concurring opinion, said:

"The Twenty-first Amendment made a fundamental change, as to control of the liquor traffic, in the constitutional relations between the states and national authority. Before that amendment—disregarding the interlude of the Eighteenth Amendment—alcohol was for constitutional purposes treated in the abstract as an article of commerce just like peanuts and potatoes. As a result, the power of

the states to control the liquor traffic was subordinated to the right of free trade across state lines as embodied in the Commerce Clause. The Twenty-first Amendment reversed this legal situation by subordinating rights under the Commerce Clause to the power of a state to control, and to control effectively, the traffic in liquor within its borders. * * *

"* * * If a state for its own sufficient reasons deems it a desirable policy to standardize the price of liquor within its borders either by a direct price-fixing statute or by permissive sanction of such price fixing in order to discourage the temptations of cheap liquor due to cut-throat competition, the Twenty-first Amendment gives it that power and the Commerce Clause does not gainsay it."

See, also, *State, ex rel. Zugravu, v. O'Brien, supra* (130 Ohio St., 23), wherein it was found by this court, with regard to the Liquor Control Act, that, "under its statutory provisions, natural and artificial persons may engage in the liquor traffic *only to the extent to which they are permitted to do so.*"

From this it is undeniable that the General Assembly of Ohio has the power to prescribe that there shall be a minimum price established for the sale of any particular liquor, and that it may delegate the fixing of such minimum price to a properly constituted agency such as the Ohio Board of Liquor Control.

Thus, by the enactment of Section 4301.13, Revised Code, the General Assembly has merely exercised a power which it undeniably has.

Appellant, however, raises a further question by arguing that Section 1, Article VII of Regulation 3, is invalid because it contravenes a stated legislative policy or purpose in establishing minimum prices on bottled wines in Ohio. It contends that such a legislative purpose is ex-

pressed by the title of the act wherefrom Section 4301.13 was derived, *i.e.*, Amended Substitute Senate Bill No. 159, which title is as follows:

"AN ACT

"To provide for the sale of bottled wine under fair trade regulations and for that purpose to authorize the Board of Liquor Control to adopt such regulations, and to enact supplemental Section 6064-3*a* [Section 4301.13, Revised Code]."

Appellant contends that the purpose of the General Assembly was to limit the Board of Liquor Control in determining the minimum prices at which bottled wine may be sold to a formula whereby the only determination of such minimum price would be based on "fair trade" principles.

The court notes, however, that the fundamental purpose of the Liquor Control Act in the first instance is to absolutely control the liquor industry in the state of Ohio *as a matter of social and public policy*, and that its purpose is *not* merely to provide "fair competition" between liquor distributors or retailers.

It is at once apparent that appellant's view of legislative restrictions on the delegation of power to the board to fix minimum prices on bottled wine would preclude the board from any consideration of social or public policy in reaching a "fair trade" minimum price. This would, of course, be in direct contravention of the basic and fundamental tenets of the entire liquor control program, and clearly such an incompatible purpose should not and will not be read into legislation on this subject.

Nowhere in the body of the act as enacted by the General Assembly does there appear any reference to Ohio or any other "fair trade" legislation, and if the General

Assembly had intended the Board of Liquor Control to be guided thereby it would surely have so stated in no uncertain terms.

It is our conclusion regarding this contention of appellant that the board, in formulating Section 1, Article VII of Regulation 3, did not abrogate or extend the powers delegated to it by Section 4301.13, Revised Code, and that such regulation is a valid exercise of such delegated power.

Objection is also made to the delegation of power to fix minimum prices for the sale of bottled wine on the basis that such delegation includes no legislatively prescribed standards. Certainly the police power of the state with respect to liquor control is at least coextensive with the police power of the state with respect to public health, and in the second paragraph of the syllabus of *Weber v. Board of Health*, 148 Ohio St., 389, 74 N. E. (2d), 331, this court said:

"Where a law relates to a police regulation for the protection of public health, and it is impossible or impractical to provide specific standards, and to do so would defeat the legislative object sought to be accomplished, such law is valid and constitutional without providing such standards."

Considering the changing social and economic factors involved when dealing with the liquor industry and the fundamental purpose of the Liquor Control Act, it is not unreasonable to conclude that the fixing of rigid standards by the General Assembly as to the minimum price of bottled wine might well defeat the legislative purpose in enacting the measure in the first instance.

It is, then, neither surprising nor unlawful that the General Assembly vested the Board of Liquor Control, which is in constant touch with the situation in Ohio, with discretion regarding this particular piece of legislation.

In conclusion, we find that the enactment by the General Assembly of Section 4301.13, Revised Code, delegating authority to the Board of Liquor Control to establish minimum prices for the sale of bottled wine in Ohio, was within the general powers of the General Assembly concerning its control of the manufacture, distribution and sale of liquor in the state of Ohio; that Section 4301.13, Revised Code, is not unconstiutional because of a lack of prescribed standards for the establishment of such minimum price; that Section 1, Article VII of Regulatior. 3 of the Board of Liquor Control, including therein the formula established by the board for reaching a minimum price for the sale of bottled wine in Ohio, is neither in contravention nor in excess of the power granted that board by the General Assembly through Section 4301.13; and that Section 4301.13, Revised Code, is not violative of Section 8, Article I of the Constitution of the United States, the "interstate commerce clause," since that clause of the federal Constitution does not apply at all to state liquor traffic.

It follows that the judgment of the Court of Appeals must be, and it hereby is, affirmed.

Judgment Affirmed.

WEYGANDT, C. J., ZIMMERMAN, STEWART, BELL, TAFT and MATTHIAS, JJ., concur.

HERBERT, J., dissents.

HERBERT, J., dissenting. I fully agree with the statement from the *Frankenstein case* quoted at the outset of the *per curiam* opinion. It should be so apparent that Section 4301.13, Revised Code, is constitutional by all the standards since the adoption of the Twenty-first Amendment that further discussion is unnecessary.

The validity of Section 1, Article VII of Regulation 3 of the Board of Liquor Control, presents an entirely different question, however. Granting, also, that the fundamental purpose of the Liquor Control Act is to absolutely control the liquor industry in Ohio as a matter of social and public policy, as stated in the *per curiam* opinion, it should be noted that at the time of the original passing of the Liquor Control Act future amendments were clearly contemplated. Paragraph (G) of Section 4301.04, Revised Code, provides in substantially the same language as originally adopted:

"The board may submit to the Governor amendments to any laws affecting the sale of intoxicating liquor in this state when it deems desirable."

The over-all power of the Legislature not being in dispute, we must then look to its intent in the enactment of Section 4301.13, Revised Code. When this act was passed in 1949, it was captioned:

"AN ACT

"To provide for the sale of bottled wine under fair trade regulations *and for that purpose* to authorize the Board of Liquor Control to adopt such regulations, and to enact supplemental Section 6064-3*a*." (Emphasis added.)

This act has not since been amended (although some excess verbiage was stricken when it was recodified as Section 4301.13, Revised Code). It seems obvious, there-

fore, at least to the writer, that the Legislature did not intend to vest the board with the same broad powers in respect to its functions under this section as it concededly has in its other operations. While the *per curiam* opinion states that nowhere in the act is there any reference to Ohio or any other "fair trade" legislation, it should be noted that this phrase does not have quotation marks around it in the caption of the act. It would seem to follow, therefore, that the Legislature clearly intended ordinary acceptance of the words.

Coming then to consideration of Article VII of Regulation 3, let us quote the preamble:

"This article is promulgated pursuant to the provisions of Section 6064-3a of the General Code (R. C. 4301.13) to avoid economic and social consequences which flow from *unfair competition* and improper practices in the sale and distribution of alcoholic beverages. *It is hereby declared to be the policy and intent of the board, in promulgating this article to advance the social control of an alcoholic beverage* and to stabilize the sale and distribution of bottled wine in Ohio. *It is intended to eliminate practices* in the sale and distribution of wines in Ohio *which cause intemperance* and improper usage of bottled wines." (Emphasis added.)

Had this declared purpose of the Board of Liquor Control been set forth in the legislative enactment, this court would have had before it only the question of the reasonableness of the formula which follows in Section 1 of the Article. The important point, however, on which I dissent from the *per curiam* ruling is that the Legislature, in its enactment of Section 4301.13, Revised Code, specifically limited the board in adopting regulations thereunder "to provide for the sale of bottled wine under fair

trade regulations." Citations of authorities can neither add to nor subtract from a conclusion on this point.

The case of *Blackman v. Board of Liquor Control*, 95 Ohio App., 177, 113 N. E. (2d), 893, apparently was considered to be controlling by the Court of Appeals here. From a reading of that opinion it does not appear that the court there was considering anything other than the power of the board to establish Article VII of Regulation 3. It did not go into the formula devised.

Without going into all the ramifications of the provisions set up in the formula of Section 1, Article VII of Regulation 3, it is quite apparent that the board was being guided by its declared policy "to advance the social control of an alcoholic beverage and * * * eliminate practices in the sale and distribution of wines in Ohio which cause intemperance" when it fixed a 16% bottling cost markup, as admittedly the record before the board in this case establishes by the board's own witness, an employee, that 12% was adequate as contrasted with the appellant's contention that 7% was adequate so far as establishing the fair price.

There are other factors in the formula, such as inclusion of taxes prior to another markup percentage, which, if the article is examined as a fair trade regulation, merit severe criticism, but further discussion of them would be of no avail here. Suffice it to say that the record in this case clearly discloses an artificially rigged price, the effect of which is tending toward the destruction of the wine bottling industry in this state. Such a result, even though unfortunate, would of course be valid if accomplished under clear legislative approval.

In my opinion, not only does the board exceed its power when in the promulgation of this article it goes beyond fair trade considerations in the normal acceptance

of those words, but, in the exercise of such power, affirmed by the *per curiam* opinion here, it has drafted a wholly unreasonable regulation and one which is sadly in need of revision in the light of reality testified to by its own employee, Chief of the Beer and Wine Division.

I am still of the belief that, although the Legislature has complete power to declare the policy of this state with respect to the fixing of retail wine prices, it did not delegate to the Board of Liquor Control, by Section 4301.13, Revised Code, the power to regulate social evils in connection with the wine industry and to eliminate alleged sales practices causing intemperance, and, further, that the Board of Liquor Control here has promulgated a wholly unreal and unreasonable regulation which has resulted in a most unfair trade regulation.

The principles set forth in the case of *Weber v. Board of Health*, 148 Ohio St., 389, 14 N. E. (2d), 331, could well be cited in support of this dissenting opinion as could also the ruling in the case of *Serrer v. Cigarette Service Co.*, 148 Ohio St., 519, 76 N. E. (2d), 91, even recognizing the distinction that in the *Serrer case* the industry sought to be regulated was not operating under privilege by the state.

APPENDIX D.

JOURNAL ENTRY OF THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO.

(Filed Dec. 21, 1956.)

This day this cause came on to be heard upon an appeal by the Appellant, The Pompei Winery, Inc., on questions of law from a judgment of the Court of Common Pleas affirming and sustaining an order of the Board of Liquor Control suspending the Class A-2, B-4 and B-5 permits of the Appellant.

Whereupon, the Court, upon due consideration of the assignments of error on this appeal on questions of law, fails to find any error prejudicial to the rights of Appellant and the judgment of the Court of Common Pleas, is therefore affirmed at the cost of the Appellant.

It is further ordered that a mandate issue to the Court of Common Pleas for enforcement of the judgment.

To all of which Appellant excepts.

FRED J. MILLER,
ROSCOE G. HORNBECK,
WM. C. WISEMAN,
Judges.

APPENDIX E.

JOURNAL ENTRIES OF THE SUPREME COURT OF OHIO.

JOURNAL 42, PAGE 444

APPEAL FROM THE COURT OF APPEALS OF FRANKLIN COUNTY

This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Franklin County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Court of Appeals be, and the same is hereby, affirmed; and it appearing to the Court that there were reasonable grounds for this appeal it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended taxed at $_____.

ORDERED, That a special mandate be sent to the Court of Common Pleas of Franklin County, to carry this judgment into Execution.

ORDERED, That a copy of this entry be certified to the Clerk of the Court of Appeals of Franklin County, "for entry."

JOURNAL 42, PAGE 465

APPLICATION FOR REHEARING

Upon consideration of the above application for rehearing, it is ordered by the Court that rehearing be, and the same hereby is, denied.